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IN THE
COURT OF APPEALS OF INDIANA

XAVIER R. GARCIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 01A02-0608-CR-688
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0601-FB-1

April 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Xavier R. D. Garcia pleaded guilty to five counts of Burglary,[1] class B felonies, six counts of Theft,[2] class D felonies, one count of Attempted Theft,[3] a class D felony, and one count of Receiving Stolen Property,[4] a class D felony. He was sentenced to thirty years in prison, with ten years suspended to probation. Garcia appeals, presenting the following restated issue: Was his sentence appropriate?

We affirm.

In Monroe, Indiana on November 28, 2005, Garcia and two others, Nicholas Vulgamott and Derek Aguilar, drove in Garcia's mother's car and broke into and entered Dave and Sheila Schnitz's home, rummaged through their belongings, and gathered numerous items into a pile. Before Garcia and his confederates could take the items, either Dave or Sheila came home, which prompted them to leave. Undaunted, the three proceeded to enter John Ginocchio's garage, from which they took a saw. From Ginocchio's garage they traveled to Glen Strahm's garage, from which they took three firearms. They fled when Strahm began yelling at them. The group proceeded to Verlin McIntosh's home, where they broke into four vehicles. McIntosh, too, began yelling at them, which caused them to flee. Nevertheless, the three next went to the Fawcetts' home, where they took a wallet from a parked vehicle. After visiting the Fawcetts', the

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[1] Ind. Code Ann. § 35-43-2-1(1) (West, PREMISE through 2006 2nd Regular Sess.).

[2] I.C. § 35-43-4-2(a) (West, PREMISE through 2006 2nd Regular Sess.).

[3] I.C. § 35-43-4-2(a) (West, PREMISE through 2006 2nd Regular Sess.); Ind. Code Ann. § 35-41-5-1(a) (West, PREMISE through 2006 2nd Regular Sess.).

[4] I.C. § 35-43-4-2(b).

three stole another gun from an unknown victim's truck. The group then went to Julie Noblett's home, from which they took a purse. Finally, they traveled to Bob Barger's garage, from which they took a cellular telephone and camera from a van.

Police apprehended the group shortly after leaving Barger's garage. Garcia initially denied involvement in the numerous crimes, but finally admitted to some, though not total, involvement in the spree. The State charged Garcia with, and Garcia pleaded guilty to, five counts of burglary as class B felonies, six counts of theft as class D felonies, one count of attempted theft as a class D felony, and one count of receiving stolen property as a class D felony. There was no plea agreement. For purposes of sentencing, the trial court merged five counts of theft into the five counts of burglary, imposed the advisory, ten-year sentence upon each of the five burglary counts, and imposed the advisory, one and one-half years sentence upon each of the remaining three class D felony counts. The trial court imposed an aggregate sentence of thirty years, twenty years of which were ordered executed and ten of which were suspended to probation.

In crafting its sentence, the trial court stated:

> [T]his is one of those rare sentences where I would probably be willing to take a look at it after you've been at [the] DOC for a substantial period of time . . . . [T]here are five class B [felony] burglaries which are defined as crime[s] of violence for purposes of I.C. 35-50-1-2[,] which means that [] the court . . . is not limited to the concept of an episode [of criminal conduct.] However[,] I think that there is value in looking [at] what the legislature sought to do in I.C. 35-50-1-2 in that [] the total of consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one class . . . higher than the most serious of the felonies for which the person has been convicted. In

> this case, . . . while I would aggravate and make consecutive the class B felony convictions, I think that they should be capped and I like that capping even though I'm not bound by that in the Indiana Code . . . . Now after five actual years are served, I would review this.
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> . . . [W]hile I [am not] . . . legally constrained by 35-50-1-2(c) because these are crimes of violence, I think that given [Garcia's] age, that constraint should be applied and that's the reason why I come up with this sentence[.] . . . I'm going to assess . . . the [advisory] of ten years on each burglary and I'll assess the [advisory] one and one-half years on the thefts . . . . They will be ordered consecutive subject to a cap of thirty [years] so that the actual sentence for the total is going to be twenty served, ten suspended. [The sentence will be] [r]eview[ed] after five actual years [served] . . . .

Transcript at 46-47, 48. Garcia now appeals.

Garcia contends his sentence is inappropriate. Upon appeal, we may review and revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find the sentence is inappropriate in light of the nature of the offense and the offender's character. *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *trans. denied*; Ind. Appellate Rule 7(B). Although we must give due consideration to the trial court's sentencing determination because of its special expertise in making such decisions, App. R. 7(B) is an authorization to revise sentences when certain broad conditions are satisfied. *Creekmore v. State*, 853 N.E.2d 523.

The advisory sentence is the starting point the General Assembly has selected as an appropriate sentence for the crimes committed. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006). The advisory sentence for a class B felony is ten years, Ind. Code Ann. § 35-50-2-5 (West, PREMISE through 2006 2nd Regular Sess.), and for a class D felony is one and one-half years. I.C. § 35-50-2-7. The trial court imposed the advisory sentence for

all five class B felony burglaries and the class D felony theft, attempted theft, and receipt of stolen property convictions. The trial court further "ordered consecutive [sentences] subject to a cap of thirty [years] so that the actual sentence for the total is going to be twenty served, ten suspended." *Transcript* at 48.

As to the nature of the offenses, Garcia engaged in a crime spree during which he stole from at least eight people, two homes, three garages, and seven vehicles. *See Gornick v. State*, 832 N.E.2d 1031, 1035 (Ind. Ct. App. 2006) (nature of multiple offenses, including defendant's "considerable crime spree[,]" justified, in part, aggravated sentence), *trans. denied*. As Garcia points out, he committed a "crime spree that lasted until [he] got caught . . . ." *Appellant's Brief* at 8. Among the items taken were a shotgun, three other firearms, and a saw.

Nevertheless, relying upon *Frye v. State*, 837 N.E.2d 1012 (Ind. 2005), Garcia argues his sentence is inappropriate because the crimes did not involve violence and the victims suffered only minimal pecuniary loss. *See id.* (defendant's enhanced, forty-year sentence was inappropriate because there was no violence and only marginal pecuniary loss). Garcia's argument is misguided. Although Garcia did not physically attack his victims, he committed the instant crimes while armed and while several of his victims were home. *Cf. id.* at 1014 ("[defendant] committed Burglary and Theft without being armed and while [the victim] was away from her home"). Further, our statutes designate class B felony burglary as a "crime of violence". Ind. Code Ann. § 35-50-1-2(a)(13) (West, PREMISE through 2006 2nd Regular Sess.); *but see Frye v. State*, 837 N.E.2d 1012 (no violence in defendant's commission of class B felony burglary).

As to Garcia's character, the trial court identified the following aggravating circumstances: Garcia's criminal history, which includes two findings of delinquency for criminal damage, one finding of delinquency for petty criminal damage, one finding of delinquency for misconduct with a weapon (Garcia threatened another student at school with a knife), and pending charges of attempted burglary, theft, and attempted theft; and that Garcia began using drugs and alcohol at the age of seven.

The Adams County Sheriff's Department's inmate log also reveals Garcia's consistent inability to behave himself. Garcia told officers he was going to "get out of [the D.O.C.] in like 10 years and he was then going to kick Nick Vulgamott's ass." *Appellant's Appendix* at 50. He further told officers, "you guys can suck my fucking dick[,]" *id.* at 48, as well as repeatedly called the officers "motherfuckers." *See, e.g., id.* at 46. Further, after the trial court announced his sentence, Garcia stated, "[y]ou made me plead guilty to all that shit. I didn't even get a fucking plea bargain." *Transcript* at 48. He further stated, "[f]uck that[,]" *id.* at 50, and began "[c]rying and yelling." *Id.* at 52. The record is also replete with instances in which Garcia has threatened harm to others. *See, e.g., Appellant's Appendix* at 60 ("when [Garcia] was in Arizona, he would frequently become involved in physical and verbal altercations during which he [would] threaten to kill someone"; "a peer made a negative comment to him, resulting in [Garcia] running into a kitchen and grabbing a steak knife, threatening to kill the peer").

The trial court identified the following mitigating circumstances: Garcia's age (sixteen); that Garcia accepted responsibility for his actions (he pleaded guilty); and his diagnoses of bipolar disorder and attention deficit disorder (A.D.D.). To this list of

mitigating factors, Garcia would add that "he can improve his prospects significantly if he improves his educational level and receives proper medication." *Appellant's Brief* at 13. As Garcia notes in his brief, however, "he had several juvenile adjudications, he had not taken advantage of prior placements . . ., he violated jail rules prior to sentencing, and he could not control his behavior at sentencing." *Id.* at 9.

Garcia asserts his sentence is inappropriate because of his age, diagnoses, and acceptance of responsibility. As indicated, the trial court took account of these mitigating circumstances when it ordered a thirty-year sentence. Further, Garcia stated he committed these crimes in order to impress and befriend his cohorts rather than, for instance, because of either his bipolar disorder or A.D.D. The trial court clearly gave special consideration to Garcia's relatively young age, and agreed to review his sentence after five years have been served. Given Garcia's extensive criminal history in a relatively brief period, his tendency to act and react violently, and his inability to conform his conduct to rules imposed upon him, but mindful of his age and diagnoses, we cannot say Garcia's sentence is inappropriate. *See Davies v. State*, 758 N.E.2d 981, 991 (Ind. Ct. App. 2001) (sixteen-year-old defendant's sentence not "unreasonable" in light of, among other things, criminal history), *trans. denied*.

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.